

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF ALABAMA

SOUTHERN DIVISION

FILED

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U.S. DISTRICT COURT  
N.D. ALABAMA

UNITED STATES OF AMERICA

-v-

ERIC ROBERT RUDOLPH,  
Defendant

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CR 00-S-0422-S

**UNITED STATES'S MEMORANDUM OF LAW REGARDING  
DERIVATIVE SUPPRESSION ISSUES**

Comes Now the United States of America, by and through its counsel, Alice H. Martin, United States Attorney for the Northern District of Alabama, and Michael W. Whisonant and William R. Chambers, Jr., Assistant United States Attorneys, and respectfully files this Memorandum Regarding Derivative Suppression Issues.

On October 13, 2004, the Court held a status conference that addressed, among other topics, issues raised by Rudolph's suppression motions and the scheduling of an evidentiary hearing on these motions. During the conference, Rudolph raised for the first time an argument that Search Warrant 2:98-M-09, executed at Rudolph's trailer on Caney Creek Road in Murphy, North Carolina, is subject to derivative suppression as a "fruit" of an earlier search, performed pursuant to Search Warrant 2:98-M-08, at Rudolph's storage unit in Marble, North Carolina. During the ensuing discussion, the Court recognized the United States' stated intention not to introduce

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evidence seized pursuant to Search Warrant 2:98-M-08 and observed that, if the factual basis for the finding of probable cause for Search Warrant 2:98-M-09 arose independently of any evidence obtained from Search Warrant 2:98-M-08, Rudolph's derivative suppression argument could be resolved as a matter of law before the evidentiary hearing. The Court further suggested that it might resolve this issue before the evidentiary hearing, thus avoiding the need to present evidence on moot factual issues.<sup>1</sup>

This Memorandum is filed to supplement the Court's discussion of the independent source rule as a ground for upholding Search Warrant 2:98-M-09, so that the Court may avoid the litigation of moot factual issues relating to Search Warrant 2:98-M-08 during the evidentiary hearing. The affidavit submitted in support of Search Warrant 2:98-M-09 amply establishes probable cause to justify the issuance of the warrant even if the few sentences relating to evidence obtained during the execution of Search Warrant 2:98-M-08 are excised from the affidavit. The

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<sup>1</sup> As noted during the status conference, the United States is relying solely on the abandonment theory in seeking to introduce evidence arising from Search Warrants 2:98-M-10, 2:98-M-20, and 2:98-M-21. Consequently, the validity of these warrants, and the extent to which the affidavits in support of these warrants rely in any respect upon evidence seized pursuant to Search Warrant 2:98-M-08, are not issues for resolution by the Court. Stated another way, derivative suppression issues arising from Search Warrant 2:98-M-08 are not raised with respect to Search Warrants 2:98-M-10, 2:98-M-20, and 2:98-M-21.

application of the independent source rule thus yields a conclusion that Magistrate Judge Cogburn properly issued Search Warrant 2:98-M-09 even if it is assumed, for purposes of argument, that Search Warrant 2:98-M-08 is invalid.<sup>2</sup> The United States respectfully requests that the Court issue a ruling to this effect prior to the upcoming evidentiary hearing, thus obviating the need to present and consider factual evidence relating to Search Warrant 2:98-M-08.

The independent source rule operates to uphold the validity of a search warrant even if the affidavit filed in support of the warrant relies upon illegally obtained evidence—so long as the warrant sets forth sufficient facts obtained independently of the illegally obtained evidence to establish probable cause. Segura v. United States, 468 U.S. 796, 813-14 (1984) (whether initial entry was illegal was irrelevant to admissibility of evidence seized pursuant to later search warrant where independent source existed for warrant and exclusion of evidence as derivative or “fruit of the poisonous tree” was not warranted in view of that independent source); United States v. Glinton, 154 F.3d 1245, 1254-55 (11<sup>th</sup> Cir. 1998) (warrant upheld despite the

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<sup>2</sup> As stated in the United States’s Consolidated Response to Rudolph’s Motions to Suppress Evidence Obtained Pursuant to Search Warrants, the United States maintains that Search Warrant 2:98-M-08 is a valid warrant and was executed legally. The United States simply has decided, in the interests of expediency at trial, not to rely on evidence seized pursuant to this warrant, rendering the validity of the warrant moot for purposes of this case.

inclusion of facts in the affidavit obtained from an earlier, illegal search because the other facts in the affidavit, learned independently of the illegal evidence, were sufficient for probable cause); United States v. Markling, 7 F.3d 1309, 1315-16 (7<sup>th</sup> Cir. 1993) (a search warrant procured in part on the basis of the illegally obtained information would still support a search, if the untainted information supporting the warrant were sufficient to establish probable cause).

Here, the affidavit filed in support of Search Warrant 2:98-M-09 consists of 39 paragraphs crowded with facts obtained by law enforcement as of February 3, 1998. Information relating to the execution of Search Warrant 2:98-M-08 at Unit 91 of Cal's Mini Storage is found in only one of these 39 paragraphs. See Aff. ¶ 31. Specifically, Paragraph 31 states that: (1) the agents executed the search warrant at Unit 91 on February 1, 1998, and saw no visible high explosives; (2) agents seized a container of nails and other objects, including spent firearm ammunition casings; (3) at that time, agents had not been able to complete a laboratory analysis of the nails to compare them to nails used in the Birmingham bomb; (4) an explosives-trained canine alerted to the container, leading the canine handler to believe that the container may contain residues of explosives, but the handler acknowledged that the canine alert also could be based upon the firearm ammunition casings; and (5) no scientific tests had been completed at that time to confirm the presence of explosives residue

on the container. Id.

The affidavit contains the following facts that were obtained before and after the search at Rudolph's storage unit, and which were not related to the search of the storage unit:

1. An improvised explosive device detonated at 7:32 a.m. on January 29, 1998, in front of the New Woman All Women Health Care Clinic in Birmingham (id. ¶ 3, 6);
2. The explosion killed Birmingham Police Officer Robert Sanderson and seriously injured clinic head nurse Emily Lyons (id. ¶ 4);
3. Forensic examination showed that the bomb contained commercial high explosives, nails, a battery or batteries, insulated wiring, a clockwork mechanism, green plastic, and an on-off slide switch (id. ¶ 5);
4. After the explosion, a witness, J.H., heard the explosion from his residence located approximately one block south and west of the clinic, and saw a white male walking "purposely" away from the blast area in a suspicious manner. J.H. further described the male as approximately 6' 1" tall, 175-85 pounds in weight, between 34 and 42 years old, with shoulder-length brown hair, wearing a thigh-length dark coat, dark pants, a baseball hat, and carrying a black knapsack that appeared empty. J.H. followed the male, spotting him and losing

him several times as J.H. drove in his car.<sup>3</sup> J.H. recognized the male even after the male had changed his appearance and dress, including his shirt and hair style, and later was carrying a large blue shopping bag which appeared to be full but not heavy. J.H. lost the male yet again and pulled into a McDonald's restaurant to call police, and while speaking to a 911 operator he saw the same male and persuaded another customer, J.T., to assist him in following the male (id. ¶¶ 7-10);

5. J.T. described the male as 5' 11" to 6' tall, approximately 180 pounds in weight, with collar-length dark hair, approximately 35 years old, wearing a baseball cap, green and black plaid short-sleeve shirt over a long-sleeve black shirt, and wearing a black backpack that appeared to be full (id. ¶ 12);
6. J.H. and J.T. watched the male walk into a wooded area, and then J.T. described his sighting to a Birmingham Police officer who had responded to the restaurant. J.H. and J.T. then went out in their cars to try to find the male. J.T. saw the male standing behind a gray Nissan pickup truck with a camper

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<sup>3</sup> J.H. and the other witnesses described in this Memorandum provided detailed and precise descriptions of the streets, intersections, and other identifying features where they saw this male. While this level of detail is not repeated here for purposes of summarizing these facts, the level of detail provided by these witnesses and repeated in the affidavit certainly supports Magistrate Judge Cogburn's finding of probable cause.

shell and placing something in the back of the truck. J.T. watched the male enter the truck and pull into traffic, and J.T. pulled his car behind the truck and wrote down the truck's license plate number, North Carolina KND1117. J.T. stopped following the truck when he saw the police officers again and went to advise the officers of what he saw. Meanwhile, J.H. also saw the grey Nissan pickup truck with the camper shell being driven by the same white male he saw walking away from the explosion, and he too pulled behind the truck and independently wrote down the same license plate number as J.T. (id. ¶¶ 13-14);

7. Alabama State Troopers traced North Carolina license plate number KND1117, reported by witnesses J.H. and J.T., to a vehicle registered to Defendant Eric Rudolph, with an address of 30 Allen Avenue, Asheville, North Carolina. Prior addresses used by Rudolph included residences in Topton and Marble, North Carolina (both located near Murphy) (id. ¶¶ 18-19);
8. E.K.R., Rudolph's brother-in-law, told law enforcement that he last saw Rudolph on January 24, 1998, and that Rudolph was driving his gray truck with a camper shell at that time. E.K.R. reported that Rudolph was secretive about where he lived, and E.K.R. believed that Rudolph was living in Tennessee and was unemployed. E.K.R. said that Rudolph had implied to E.K.R. that Rudolph had knowledge of explosives (id. ¶ 21-22);

9. Witnesses told law enforcement that they had seen Rudolph driving a grey pickup truck, which they recognized as belonging to Rudolph, in western North Carolina during the 10 days prior to the explosion in Birmingham. A search of a law enforcement database showed that Rudolph's truck had not been reported stolen (id. ¶ 23);
10. On January 30, 1998, a material witness warrant was issued for Rudolph in the Northern District of Alabama, and despite extensive local, regional, and national publicity regarding the warrant and attempts to locate Rudolph, and despite significant efforts to find Rudolph, he had not been located and his family had not reported any contacts with him (id. ¶ 23);
11. On February 1, 1998, Cal Stiles, the owner of Cal's Mini Storage in Marble, North Carolina, reported to agents that Rudolph had rented a storage unit on October 7, 1997, and rent had been paid on the unit through January 31, 1998. Stiles identified photos of Rudolph as the person who rented the storage unit. That day, an explosives-trained canine was twice walked along the building where Rudolph's unit was located and alerted to the handle and lock of Rudolph's unit, suggesting to the canine handler that explosives residue was on the door of Rudolph's storage unit. The storage unit is located approximately 9.4 miles from Rudolph's trailer on Cane Creek Road (id. ¶¶ 24-



26);<sup>4</sup>

12. On January 30, 1998, an employee of Murphy Power in Murphy reported to agents that Rudolph was the subscriber of the electric power account at the trailer located on Caney Creek Road, and he provided a copy of the application for service that was completed by Rudolph (id. ¶ 32);
13. On January 31, 1998, J.C. reported to agents that he owned the trailer on Caney Creek Road in Murphy, and that he had rented the trailer on November 11, 1997, to a white male who identified himself as Bob Randolph or Bob Rudolph. J.C. provided the agents with a rental agreement signed by Bob Randolph or Bob Rudolph, which had been inadvertently dated October 11, 1997. When shown photos of Rudolph, J.C. identified Rudolph as the male who rented the trailer (id. ¶¶ 33-34);
14. Witness Ju.C. reported to agents that at approximately 5:00 p.m. (E.S.T.) on January 29, 1998 (approximately 8 1/2 hours after the explosion), he saw a grey Nissan pickup truck with a camper shell turn on the gravel driveway off Caney Creek Road in Murphy, leading to the trailer rented by Rudolph. Murphy is approximately 240 miles from Birmingham, with an approximate

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<sup>4</sup> It is important to note that the facts relating to Rudolph's storage unit set forth here were obtained by agents before the search of his storage unit pursuant to Search Warrant 2:98-M-08.

travel time by car of five to six hours (id. ¶ 35);

15. Agents arrived at Rudolph's trailer on January 30, 1998. The agents saw the interior lights on, the interior front door open, and the front glass storm door closed. They saw no vehicles or persons present. The agents maintained constant surveillance on the driveway leading to the trailer up until the presentation of the affidavit to Magistrate Judge Cogburn, and saw no vehicular or pedestrian traffic on the driveway. The agents also periodically checked the trailer and saw no changes to the trailer up to the signing of the warrant (id. ¶ 36);
16. On February 1, 1998, D.D.R.M. reported to agents that she saw a person known to her as Eric Rudolph at Plaza Video in Murphy on either January 25 or 26 and noticed that he had beard growth. D.D.R.M. reported that she saw Rudolph at the store later in the week and noticed he had shaved his beard to a "Fu Manchu" style mustache. D.D.R.M. reported that she also saw Rudolph at the video store on the afternoon of January 29, 1998, and saw that Rudolph had wet hair, was clean shaven, and appeared to have recently showered. The records maintained by Plaza Video showed that Rudolph rented the video City of Industry at 5:31 p.m. (E.S.T.) on January 29, 1998, returned the video on January 30, 1998, and rented the video Kull the Conquerer that same day. The

records indicated that Rudolph had not returned Kull the Conquerer, which is unusual as Rudolph regularly rented videos and returned them on time (id. ¶ 37);

17. Records at Plaza Video further indicated that Rudolph rented a video called The Game on January 25, 1998, and returned the video on January 26, 1998. An explosives-trained canine was walked by the videotape for The Game that was rented by Rudolph along with a number of other videos, and twice alerted to the videotape for The Game. The handler of the canine believes that the canine's alert to the videotape suggests the presence of explosives residue on it (id. ¶ 39); and
18. Forensics examiners employed by the Bureau of Alcohol, Tobacco, and Firearms ("ATF") who possess training and experience in the use of high explosives reported to agents that the construction of bombs often results in the creation of residues of various sizes. These residues often are transferred from the hands of the person who constructs the bombs to items that the person has handled, and may remain there for many months and even years, depending on the conditions (id. ¶ 40).

The facts set forth above are not the fruits or results of any evidence seized during the execution of Search Warrant 2:98-M-08 at Rudolph's storage unit. To the


contrary, as far as the affiants for Search Warrant 2:98-M-09 were concerned, Search Warrant 2:98-M-08 yielded only a container of nails to which an explosives-trained canine had alerted, but the affiants were not even sure at that time whether the canine alert occurred because of the presence of explosives residue or the presence of ammunition casings. Considered together, the facts set forth in the affidavit submitted in support of Search Warrant 2:98-M-09 are more than sufficient to establish probable cause that Rudolph used a destructive device in the commission of a crime of violence in violation of Title 18, United States Code, Section 924(c), used a weapon of mass destruction in violation of Title 18, United States Code, Section 2332a, or committed any of the other offenses listed on page one of the affidavit. Illinois v. Gates, 462 U.S. 213, 238 (1983) (when assessing whether an affidavit establishes probable cause to support a search, the magistrate to whom the affidavit initially is presented must examine the "totality of the circumstances" to determine whether "there is a fair probability that contraband or evidence of a crime will be found in a particular place"); United States v. Brundidge, 170 F.3d 1350, 1352 (11<sup>th</sup> Cir. 1999) (same).

Accordingly, the Court should conclude as a matter of law that the affidavit filed in support of Search Warrant 2:98-M-09 contains facts obtained independently of any evidence seized pursuant to Search Warrant 2:98-M-09 that are sufficient to

establish probable cause to issue the warrant. As stated earlier, this conclusion will obviate the need for the Court to rule upon the validity of Search Warrant 2:98-M-08, and evidence relating to Search Warrant 2:98-M-08 need not be presented during the upcoming evidentiary hearing.

Respectfully submitted this the 18<sup>th</sup> day of October, 2004.

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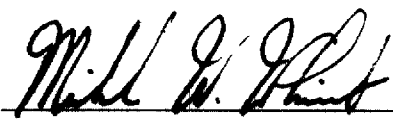
**CERTIFICATE OF SERVICE**

This is to certify that a copy of the foregoing has been served on the defendant by mailing a copy of same this date 18<sup>th</sup> day of October, 2004, by First Class, United States mail, postage prepaid, to his attorneys of record,

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